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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WALTER P. COONS,

Cross-Petitioner,

vs.

HONDA MOTOR COMPANY, LTD.,

Cross-Respondent.

CROSS-PETITION AND APPENDIX FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

ROBERT H. JAFFE
JAFFE & SCHLESINGER, P.A.,
Counsel for Cross-Petitioner
Walter P. Coons

8 Mountain Avenue,
Springfield, New Jersey 07081
(201) 467-2246

Appellate Printing Co., Inc. (201) 753-0200

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QUESTION PRESENTED

Did the court below err in determining that the New Jersey legislature violated the Commerce Clause when it enacted a tolling statute which denied the procedural remedy of a limitations defense to foreign corporations not "represented" in the State of New Jersey by persons on whom process can be served?

PARTIES BELOW

Cross-petitioner—the plaintiff-appellee in the court below—is Walter P. Coons ("Coons"), a resident of the State of New Jersey. Also appearing as a plaintiff-intervenor in the court below for the purpose of defending the constitutionality of the New Jersey tolling statute, *N.J.S.A.* 2A:14-22, was the Attorney General of New Jersey.

Petitioner-defendant—the appellant in the court below—is Honda Motor Co. Ltd., a Japanese corporation ("Honda"), a foreign corporation not registered or otherwise represented in the State of New Jersey or any other state during the time period relevant to this case.

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WALTER P. COONS,

Cross-Petitioner,

vs.

HONDA MOTOR COMPANY, LTD.,

Cross-Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Pursuant to *Rule* 19.5 of this Court, cross-petitioner Coons respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey in the case entitled *Walter P. Coons v. American Honda Motor Co., Inc.*, 94 N.J. 307, 463 A.2d 921 (1983) holding that the New Jersey tolling statute, *N.J.S.A.* 2A:14-22, violates the Commerce Clause of the United States Constitution.

/s/ Robert H. Jaffe
ROBERT H. JAFFE
JAFFE & SCHLESINGER, P.A.,
8 Mountain Avenue
Springfield, N.J. 07081
(201) 467-2246
Counsel for Cross-Petitioner
Walter P. Coons

Dated: October 10, 1984

OPINIONS BELOW

The opinion of the New Jersey Supreme Court declaring the New Jersey tolling statute unconstitutional as violative of the Commerce Clause ("Coons I") is reported at 94 N.J. 307, 463 A.2d 921 (1983), Honda App. at 28a-54a.[1]

An earlier decision of the Appellate Division of the New Jersey Superior Court holding that the tolling statute is constitutional notwithstanding a challenge under the equal protection and due process provisions of the Fourteenth Amendment of the United States Constitution is reported at 176 N.J. Super. 575, 424 A.2d 446 (1980). Honda App. at 55a-64a. It is this Appellate Division opinion which ultimately was remanded, *Honda Motor Co., Ltd. v. Coons*, 455 U.S. 996, 71 L.Ed.2d 857 (1982), by this Court for further proceedings consistent with *G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 71 L.Ed.2d 250 (1982).

Another decision finding that Coons was barred by the New Jersey two year statute of limitations from suit against Honda's American distributor was not reported but is reproduced in Honda's Appendix. Honda App. 65a-68a.

The opinion of the court below holding that its decision in *Coons I* should be applied prospectively, ("Coons II") rather than retroactively, is reported at 96 N.J. 419, 476 A.2d 763 (1984). Honda App. at 1a-27a.

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1. "Honda App. at 28a-54a" refers to pages 28 to 54 of Honda's Appendix to Petition for a Writ of Certiorari to the Supreme Court of New Jersey, Supreme Court Docket No. 84-385.

JURISDICTION

The judgment of the New Jersey Supreme Court in *Coons I* was rendered on August 3, 1983. Honda App. at 28a-54a. A timely petition for rehearing was filed by Coons and it was granted in part as to the issue of whether the judgment in *Coons I* was to be given prospective or retroactive effect. Honda App. at 4a.

On September 11, 1984, Honda filed a timely petition for writ of certiorari of the judgment in *Coons II* invoking the jurisdiction of this Court under Section 1257(3) of the United States Judicial Code, 28 U.S.C. § 1257(3). Pursuant to Rule 19.5 of this Court, allowing the filing of an "untimely" cross petition not more than 30 days after receipt of a timely petition for certiorari, Coons has filed this cross petition which seeks review of the decision in *Coons I* under 28 U.S.C. § 1257(3). If certiorari is granted to this cross petition and the judgment of the court below is reversed as a result, that reversal would be wholly dispositive of the issues raised by Honda in its petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional provision, Article I, § 8, cl. 3 ("the Commerce Clause"), and the New Jersey statute, *N.J.S.A.* 2A:14-22 ("the tolling statute"), reproduced at page 3 of Honda's petition, the following statutes of the State of New Jersey are applicable to this case and read as follows:

14A:13-3 Admission of foreign corporations.

(2) Without excluding other activities which may not constitute transacting business in this State, a foreign corporation shall not be considered to be

transacting business in this State, for the purposes of this act, by reason of carrying on in this State any one or more of the following activities.

(a) maintaining, defending or otherwise participating in any action or proceeding, whether judicial, administrative, arbitrative or otherwise, or effecting the settlement thereof or the settlement of claims or disputes;

14A:13-11. Transacting business without certificate of authority.

(2) The failure of a foreign corporation to obtain a certificate of authority to transact business in this State shall not impair the validity of any contract or act of such corporation, and shall not prevent such corporation from defending any action or proceeding in any court of this State.

STATEMENT OF THE CASE

A. *Introduction*:

The judgment in *Coons I* declaring the New Jersey tolling statute, *N.J.S.A.* 2A:14-22,[2] unconstitutional as being in violation of the Commerce Clause because it requires a foreign corporation to register to do business in order to be "represented" for the purposes of taking advantage of a New Jersey statute of limitations, Honda App. at 29a-30a, could have been appealed as a matter of right by Coons pursuant to Section 1257(2) of the

2. All references to the tolling statute in this cross-petition are to *N.J.S.A.* 2A:14-22 as amended in 1949 to give foreign corporations represented by a person in New Jersey on whom process can be served the same benefit of a limitations defense as domestic corporations.

United States Judicial Code, 28 U.S.C. § 1257(2). This federal statute declares that a final judgment rendered by the highest court of a state, which draws in question the validity of any state statute on the ground of its being repugnant to the Constitution, may be appealed.

Coons did not elect to exercise his right of appeal in this case because of certain subsequent rulings by the New Jersey Supreme Court. After the judgment in *Coons I* was rendered on August 3, 1983, the cross-petitioner filed a timely petition for rehearing. On January 3, 1984, the court below granted that part of the petition which raised the question of whether the judgment in *Coons I* should be made retroactive or prospective. Honda App. at 3a-4a. Using remarkable phraseology, on June 13, 1984, the New Jersey Supreme Court ruled in *Coons II* that its earlier decision to give *Coons I* retroactive effect, "made without the benefit of an adversary hearing directed to the point," was "ill considered." Honda App. at 7a.

In addition to deciding that the decision to invalidate the New Jersey tolling statute on Commerce Clause grounds in *Coons I* should be made prospective rather than retroactive, the court below made two other material determinations in *Coons II* which favored the cross-petitioner and other similarly situated New Jersey residents represented by plaintiff-intervenor Attorney General of New Jersey and associated *amici*.

First, the New Jersey Supreme Court determined that neither Honda nor any of its supporting corporate *amici* should be given the benefit of the ruling in *Coons II*. Honda App. at 18a. This ruling in favor of the cross-petitioner constitutes an exception, although a sound one in this case, to the general rule that a litigant who succeeds in setting aside an established law should receive

the benefit of that judgment even where it is applied prospectively to other litigants.[3]

Second, the court below ruled that the effective date of its ruling in *Coons II* would be August 3, 1985, two years after the judgment in *Coons I*. Honda App. at 19a. An express reason given in the majority opinion for this delay in effective date was that:

> "(T)he hiatus effected by our conclusion in this regard affords the (New Jersey) Legislature an opportunity to address any public policy concerns that are implicated by *Coons I*." *Id.*

In short, Coons had been successful in vindicating his individual right to bring a products liability suit for personal injuries against Honda. Together with the Attorney General of New Jersey and associated *amici*, he had been instrumental in vindicating the right to sue at least until August 3, 1985 of similarly situated New Jersey residents against all unrepresented foreign corporations by virtue of the New Jersey Supreme Court decision on equitable principles to accord prospectivity "across the board" to its ruling in *Coons II*. Honda App. at 18a. The cross-petitioner thus had no reason to file an appeal or petition for certiorari of the judgment in *Coons I* until Honda made its election to file a petition with this Court seeking review of *Coons II*.

On August 23, 1984, the New Jersey legislature provided an additional reason for the filing of this cross-petition. Acting quickly to take full advantage of the "hiatus" given it by the court below, legislation was enacted to continue without interruption the procedural remedy afforded New Jersey residents by the tolling stat-

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3. The sound reasons for this exception will be detailed in the cross-petitioner's response to Honda's petition.

ute against often difficult to locate unrepresented foreign corporations. Specifically, *N.J.S.A.* 2A:14-22 was amended to provide that a foreign corporation shall be deemed "represented" in the State of New Jersey for the purposes of that statute if it has "filed with the Secretary of State a notice designating a representative to accept service of process." Coons App. at 1a.[4] To quote a part of the Accompanying Statement to this legislation, "(the amendment) is intended to meet the (New Jersey) Supreme Court's objection as stated in the *Coons* decision and thereby assist New Jersey citizens to pursue their claims against foreign corporations." Coons App. at 2a.

The filing of this untimely cross-petition pursuant to *Rule* 19.5 of this Court, particularly in the event Honda's petition is granted, is for the purpose of giving Coons the opportunity to argue that, even before its recent amendment, the tolling statute did not violate the Commerce Clause.

A second but equally important purpose for this filing is the potential saving of judicial resources in state and federal courts. Unless the judgment in *Coons I* is reversed, there will be additional litigation by unrepresented foreign corporations such as Honda and its supporting *amici* over the constitutionality of the amended tolling statute. Such litigation will undoubtedly delay the resolution of asbestos exposure cases brought against *amicus* Brinco Mining Limited in New Jersey and possibly other states in accordance with the amended provisions of *N.J.S.A.* 2A:14-22, and similar state statutes. Honda Petition at 17-18.[5]

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4. "Coons App. at 1a" refers to page 1 of Coon's Appendix to the Cross-Petition for a Writ of Certiorari to the Supreme Court of New Jersey.

5. "Honda Petition at 17-18" refers to pages 17-18 of Honda's Petition for a Writ of Certiorari to the Supreme Court of New Jersey, Supreme Court Docket No. 84-385.

B. *Factual and Procedural Background:*

On October 30, 1974, Coons suffered severe burns when, while riding his Honda CB 350 motorcycle, an accident occurred forcing his body over the gas tank toward the handlebars. As a result of a design defect in the fuel filler cap, the cap was triggered open, gasoline flowed from the tank, it ignited and the burns ensued. Honda App. at 65a-66a.

The defect in the gas filler tank, the existence of which was admitted by Honda in a letter report to the National Highway Traffic Safety Administration ("NHTSA") dated December 22, 1977, was such that during a collision the "rider may impact the hinged fuel filler cap in such a manner as to actuate the release lever resulting in opening of the cap" and if the cap opens, "gasoline will escape and cause a fire hazard." Honda App. at 67a.

The December 22, 1977 letter made references to a NHTSA investigation of the hinged fuel filler cap used on Honda motorcycles. Coons App. at 3a-5a. That investigation was actually formally commenced by the NHTSA on November 24, 1973, although an informal investigation had been ongoing at least since November 14, 1972. Coons App. at 13a.

After finally admitting the existence of a design defect in its fuel filler cap which it denied for over five years, as part of its agreement with the NHTSA, Honda initiated a recall campaign. Coons was unaware of this campaign until July 1978, when he obtained a copy of the recall notice from his neighbor. He thereafter contacted counsel and suit was filed on October 30, 1978, naming Honda and its American distributor, American Honda Motor Co., Inc., a California corporation ("American Honda"). Honda App. at 30a and 56a.

In connection with a motion to dismiss on statute of limitation grounds made by American Honda, the trial court held that Coons had sufficient facts available to him to discover the existence of his cause of action based on a defective fuel filler cap within the two year statutory period provided for actions alleging personal injuries under N.J.S.A. 2A:14-2. It therefore granted American Honda's motion to dismiss. Honda App. at 71a-72a. The trial court, however, denied a similar motion to dismiss the cross-petitioner's complaint against Honda on the basis that it was not represented in the State of New Jersey pursuant to the requirements of N.J.S.A. 2A:14-22. Honda App. at 69a.

Upholding the dismissal of the cross-petitioner's complaint against American Honda, in an opinion rendered on December 29, 1980, the New Jersey Appellate Division significantly acknowledged that an important factor in its affirmance of the trial court's judgment was the availability to Coons of a remedy against Honda by virtue of the tolling statute. As stated by the Appellate Division in its unreported *per curiam* opinion:

> "We are simultaneously herewith filing a separate opinion affirming (denial of Honda's summary judgment on limitation grounds) in the companion appeal. Hence, plaintiff's claim against the Japanese corporation will proceed to trial irrespective of our conclusion in this appeal that the claim against American Honda, the distributor in New Jersey, is barred by the statute of limitations as determined by the trial judge." Honda App. at 66a.

In the companion appeal, the same Appellate Division panel held that Coons was entitled to his day in court notwithstanding a challenge to the tolling statute on grounds that it violated the equal protection and due

process provisions of the Fourteenth Amendment of the United States Constitution. Honda App. at 55a-64a.

Honda appealed the decision of the Appellate Division allowing Coons to prosecute his product liability claims against it. Leave to appeal was denied by the New Jersey Supreme Court on March 31, 1981. Honda then filed an appeal of the Appellate Division decision to this Court. On April 7, 1982, this Court remanded this case to the Appellate Division, 455 U.S. 996, 71 L.Ed.2d 857 (1982), for further consideration in light of its remand of *G. D. Searle & Co. v. Cohn*, 455 U.S. 404, 71 L.Ed.2d 250 (1982).

As a result of the settlement of an earlier case, *Maren Engineering Corp. v. Velmohos*, 83 N.J. 282, 416 A.2d 322 (1980), *affirmed sub. nom., G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 71 L.Ed.2d 250 (1982), *vacated and remanded on other grounds*, 455 U.S. 985, 71 L.Ed 2d 844 (1982),[6] the New Jersey Supreme Court certified this case on its own motion. Honda App. at 73a. It then became the main vehicle for litigating the Commerce Clause question left open by the remand in *Searle*.[7]

C. *Analysis of Coons I*:

Justice Robert L. Clifford, joined by three other justices of the New Jersey Supreme Court to constitute a

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6. The decision in *Velmohos* was the source of the "opaque footnote," *Searle*, 455 U.S. at 414, 71 L.Ed.2d at 259, concerning what constitutes the designation of an agent for the service of process within the State of New Jersey which directly lead to the remand of *Searle* and this case.

7. As conceded by Honda in a brief submitted to the court below, however, the petitioner had failed to raise the Commerce Clause question at any time prior to remand by this Court. This is a matter that will be discussed at greater length in Coons' response to the issues raised by Honda's petition. By letter dated October 2, 1984, this Court granted an extension of time to November 13, 1984 for Coons to file his response.

slim majority, construed the term "represented" as used in *N.J.S.A.* 2A:14-22 to require that a foreign corporation obtain a certificate to do business in New Jersey pursuant to *N.J.S.A.* 14A:13-4, which in turn requires the appointment of a registered agent. Honda App. at 30a. In so ruling, the majority of the court below agreed with Justice Powell's conclusion in *Searle* that foreign corporations in the State of New Jersey "may designate an agent for service only by obtaining a certificate of authority to do business." 455 U.S. at 419, 71 L.Ed.2d at 262-263.

Having defined the term "represented" more narrowly than the definition sought by the Attorney General of New Jersey,[8] the majority in *Coons I* went on to hold that requiring foreign corporations to obtain a certificate of authority to do business in order to gain "the benefit" of a statutory limitations defense is a "forced licensure provision" and therefore *per se* violative of the Commerce Clause. Honda App. at 37a-40a.

As authority for this determination, Justice Clifford cited *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 42 L.Ed.2d 195 (1974), *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 66 L.Ed. 239 (1921), and *Sioux Remedy Co. v. Cope*, 235 U.S. 197, 59 L.Ed.193 (1914), cases in which state statutes were struck down for conditioning the fundamental right of persons engaged solely in interstate commerce to sue in state court on the obtaining of a license to do business in that state. Although acknowledging that this Court in *Searle* cited *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 89 L.Ed. 1628 (1945) for the proposition that there is no

8. The position of the Attorney General of New Jersey as plaintiff-intervenor—consistent with that espoused by Coons—was that the tolling statute authorized foreign corporations to designate agents without registering to do business in the State of New Jersey. Honda App. at 35a.

fundamental right to statutes of limitation as they are "good only by legislative grace" and "subject to a relatively large degree of legislative control," 325 U.S. at 314, 89 L.Ed. at 1636, the court below nevertheless effectively treated the right to invoke a limitations defense as being equivalent to the right to sue. Honda App. at 39a.

Three justices of the New Jersey Supreme Court dissented in *Coons I*. In an opinion authored by Justice Sidney M. Schreiber, the minority interpreted the term "represented" as used in the tolling statute to require that a foreign corporation only need appoint an agent in New Jersey on whom service of process can be served in order to obtain the benefit of a limitations defense. Honda App. at 40a-47a.

The minority opinion—in agreement with an interpretation urged by the Attorney General of New Jersey—also disagreed with the determination made by the majority that the Secretary of State lacked power to receive and file a foreign corporation's designation of an agent to receive process for the purpose of complying with *N.J.S.A.* 2A:14-22 without registering to do business under *N.J.S.A.* 14A:13-4. Honda App. at 47a-50a.

Having asserted its disagreement with the majority's interpretation of the term "represented" and whether the New Jersey Secretary of State has the power to receive and file a designation of an agent on whom process may be served by foreign corporations otherwise unrepresented in New Jersey, the minority in *Coons I* then determined that appointing an agent for the service of process to obtain the benefit of a limitations defense was not "a disproportionate burden" on interstate commerce. Honda App. at 52a. Directing his discussion specifically at the petitioner, Justice Schreiber ruefully commented:

> "According to the Standard Dictionary of Advertisers (1982), Honda spent $21,500,000 on advertising in this country. Moody's International reports that Honda of Japan's sales in 1982 were $7,945,400,000. The message they send to the New Jersey consumer is clear and forceful. The Legislature has asked manufacturers to send one brief message about where they can be found in case anything goes wrong with the motorcycle." Honda App. at 52a.

The minority opinion in *Coons I*, after making a final observation that Honda could have "easily and at minimal cost" designated American Honda to accept service of process, concluded that the tolling provisions of *N.J.S.A.* 2A:14-22 did not violate the Commerce Clause. Honda App. at 54a.

Nowhere in the majority or minority opinions of the New Jersey Supreme Court that constitute the decision in *Coons I* is there any discussion of the fact that statutes of limitation—including tolling provisions which are an integral constituent thereof—go to matters of remedy and the practice of courts rather than any fundamental substantive right of litigants. The absence of any discussion of these legal concepts, however, should not be fatal to their consideration by this Court.

Similar to the issues of federal law raised by Honda in its petition, Honda petition at 2, the constitutional question of whether the Commerce Clause can be applied to invalidate procedural remedies that are part of the *lex fori* of a state court such as those provided by the tolling provisions of *N.J.S.A.* 2A:14-22 was timely raised by the cross-petitioner in papers filed in support of Coons' petition for rehearing in *Coons I*. Although rejected, they were duly presented to the court below and thus are properly before this Court.

REASONS FOR GRANTING THE WRIT

The Decision of the New Jersey Supreme Court in Coons I Declaring that Denial Of a Limitations Defense to Unrepresented Foreign Corporations Constitutes A Commerce Clause Violation is a Novel Determination in Conflict with Applicable Analogous Decisions of this Court Holding that Statutes of Limitations Are Part of the LEX FORI *or Procedural Remedies Provided by Court Rules Which Can be Denied Non-Residents of a Sovereign State*

Diligent research has failed to locate a single opinion of this Court which has dealt with the precise question presented by this cross-petition—whether Commerce Clause standards can be applied to invalidate a tolling statute which is a constituent part of a state's statute of limitations. The judgment in *Coons I* therefore constitutes the classic example of where a state court has decided an important question of federal law which has not been, but should be, settled by this Court and which otherwise conflicts with applicable analogous precedent.

To be sure, the Commerce Clause often has been invoked to invalidate diverse state statutes that parochially favor state interests or otherwise discriminate against interstate commerce. See, for example, *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 64 L.Ed.2d 702 (1980) (Florida statutory scheme prohibiting investment advisory services by bank holding companies with principal offices out of the state); *Philadelphia v. New Jersey*, 437 U.S. 617, 57 L.Ed.2d 475 (1978) (New Jersey statute prohibiting importation of solid and liquid wastes into the state); *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 53 L.Ed.2d 383 (1977) (North Carolina statute imposing additional costs on

Washington, but not on North Carolina, shippers); *Boston Stock Exchange v. State Tax Commissioner*, 429 U.S. 318, 50 L.Ed.2d 514, 97 S. Ct. 599 (1977) (New York statute imposing a heavier tax on transactions involving out of state sales than transactions involving intrastate sales).

There is even precedent for a reversal by this Court of a state court judgment determining that an act of its state legislature has violated the Commerce Clause. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 66 L.Ed.2d 659 (1981).

However, this Court has never before reviewed a case such as presented here where the state's highest court has invalidated on Commerce Clause grounds legislation which, to quote Chief Justice John Marshall, "relate to the remedies which are furnished in (its) courts." *Sturges v. Crowninshield*, 4 Wheat 122, 207, 4 L.Ed. 529, 551 (1817).

The nearest precedent relative to this case—and it is a very close cousin indeed—is the decision of this Court in *G.D. Searle v. Co. v. Cohn*, 455 U.S. 404, 71 L.Ed.2d 250 (1982). In *Sear*, the constitutionality of the same statute which is the subject of Honda's petition and this cross-petition was upheld in the face of an equal protection and due process challenge under the Fourteenth Amendment mounted by the same corporate *amici* who support Honda in this case. The precise holding in this regard was stated by Justice Blackmun as follows:

> "(T)he tolling provision is premised on a reasonable assumption that unrepresented foreign corporations, as a general rule, may not be so easy to find and serve." *Searle*, 455 U.S. at 410, 71 L.Ed.2d at 257.

Moreover, as part of its discussion of the question of whether the New Jersey legislature can constitutionally differentiate between represented and unrepresented foreign corporations in denying the latter a plea of limitations, this Court cited with approval the following proposition of law made part of the decision of the United States Court of Appeals for the Third Circuit in *Hopkins v. Kelsey-Hayes, Inc.*, 628 F.2d 801 (3rd Cir. 1980); *affirmed sub. nom.*, G. D. Searle & Co. v. Cohn, 455 U.S. 404, 71 L.Ed.2d 250 (1982), *vacated and remanded on other grounds*, 455 U.S. 985, 71 L.Ed.2d 844 (1982):

> "Nothing in law or logic prevents the New Jersey legislature from providing New Jersey plaintiffs with a mechanism for relief from the burdens of suits against nonrepresented foreign corporations which is additional to any mechanism found in the Court Rules." 628 F.2d at 811 (cited at 455 U.S. at 411, 71 L.Ed.2d at 257).

After having acknowledged in *Searle* that the tolling statute merely represents a supplement to rules regulating remedies provided under New Jersey court procedure, this Court observed that unrepresented foreign corporations in New Jersey were not left without a remedy against stale claims because they remained free to plead laches as an equitable defense when defending on the merits in the New Jersey courts. *Searle*, 455 U.S. at 411, 71 L.Ed.2d at 258 (citing as authority *Maren Engineering Corp. v. Velmohos*, 83 N.J. 282, 288-289, 416 A.2d 372, 376-379 (1980).

Predicated on its findings that the New Jersey tolling statute supplements existing court practice and that unrepresented foreign corporations had open to them the affirmative equitable defense of laches despite being denied the statutory procedural remedy of a limitations defense, this Court duly held in *Searle* that the enact-

ment of *N.J.S.A.* 2A:14-22 "does not deprive an unrepresented foreign corporation of the equal protection of the laws. (Citations omitted)." 455 U.S. at 412, 71 L.Ed.2d at 258.

As Honda will undoubtedly point out in its response to this cross-petition, the fact that a state statute passes constitutional muster on equal protection and due process grounds does not prevent it from being declared invalid under Commerce Clause standards. In *Baldwin v. Seelig*, 294 U.S. 511, 79 L.Ed. 1032 (1935), this Court invalidated the New York Milk Control Act when subjected to constitutional challenge by virtue of Commerce Clause standards although only the previous year it had held the very same statute constitutional when challenged under the Fourteenth Amendment in *Nebbia v. New York*, 291 U.S. 502, 78 L.Ed. 940 (1934).

Notwithstanding, since the New Jersey tolling statute is merely a supplement to that sovereign state's remedial procedures and court practices, it survives constitutional challenge when examined under Commerce Clause standards as well as the equal protection and due process provisions of the Fourteenth Amendment.[9]

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9. The following application of Commerce Clause standards is predicated on the determination of the majority in *Coons I* that the term "represented" as used in *N.J.S.A.* 2A:14-22 requires a foreign corporation to register to do business in the State of New Jersey on the basis that the construction given to a state statute by that state's highest court generally is binding on its litigants. *Brown v. Ohio*, 432 U.S. 161, 53 L.Ed.2d 187, 195 (1977); *Grayned v. City of Rockford*, 408 U.S. 104, 110, 33 L.Ed.2d 222, 228 (1972); *Winters v. New York*, 333 U.S. 507, 514, 92 L.Ed. 840, 849 (1948). But this Court is not so bound. See *Kern-Limerick, Inc. v.Scurlock*, 347 U.S. 110, 121, 98 L.Ed. 546, 556 (1954) (holding that this Court should decide for itself facts or constructions upon which federal constitutional issues rest); *New Jersey Realty Title Ins. Co. v. Division of Tax Appeals*, 338 U.S. 665, 674, 94 L.Ed. 439, 446 (1950) (holding that in passing upon the validity of a state tax under federal constitutional or statutory provisions, this Court is not limited by the state's characterization of the tax).

It is beyond dispute that a person engaged in interstate commerce is assured by the Commerce Clause that he has "free access to every market in the nation, that no home embargoes will withhold his exports, and no foreign state will by duties or regulations exclude them." *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 539, 93 L.Ed. 865, 875 (1949). The clear purpose of the Commerce Clause is protection of the American consumer from local exploitation by allowing "free competition from every producing area in the nation." *Id.* That is, while the Commerce Clause protects interstate firms from prohibitive or burdensome regulations, such protection is only afforded "when a lack of national uniformity would impede the flow of interstate goods." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 128, 57 L.Ed.2d 91, 102 (1978).

Consistent with these standards, this Court ruled in *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 66 L.Ed. 239 (1921) that denying a foreign corporation the right to sue unless it registers to do business in a state is an act of forced licensure void under the Commerce Clause since it denies foreign corporations a fundamental right intimately involved with the principle of free access to a national market. *Accord, Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 42 L.Ed.2d 195 (1974); see also *Sioux Remedy Co. v. Cope*, 235 U.S. 197, 59 L.Ed. 193 (1914).

Denying an unregistered foreign corporation the procedural remedy of a limitations defense pursuant to *N.J.S.A.* 2A:14-22, however, does not in any way limit that corporation's access to the New Jersey market for its products or the right to enforce a contract for their sale, even when the products are so defective that, as in this case, they present a fire hazard to consumers. The denial of a limitations remedy to an unrepresented foreign cor-

poration therefore does not impair its ability to defend a suit on the merits or to raise an equitable defense such as laches. This is made explicit in the New Jersey statutory scheme:

> "(T)he failure of a foreign corporation to obtain a certificate of authority to transact business. . . shall not impair the validity of any contract. . . and shall not prevent such corporation from defending any action or proceeding in any court of this State." *N.J.S.A.* 14A:13-11(2).[10]

Patently, the requirement that a foreign corporation register to do business under *N.J.S.A.* 14A:13-4 in order for it to invoke the procedural remedy of a limitations defense finds a rational basis in the concern the State of New Jersey has for protecting the rights of its residents to bring suit against foreign corporations such as Honda who, if it elects to capitalize on its amendment to Article 2 of the Hague Convention, 20 U.S.T. 361 (1969) may never be served with process.[11] This concern is fully con-

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10. The legislative intent to allow persons engaged solely in interstate commerce access to the courts of New Jersey, consistent with Commerce Clause standards, is also reflected in *N.J.S.A.* 14A:13-3(2) which provides that a foreign corporation shall not be considered to be transacting business in New Jersey by reason of "maintaining, defending or otherwise participating in any action or proceeding, whether judicial, administrative, arbitrative or otherwise. . ."

11. Based on Japan's objection to service of judicial process by international mail, including the elimination of the undertaking by its Central Authority to effect service of process under Article 2 of the Hague Convention, 28 U.S.C.A., Annotation to F. R. Civ. P. 4(i), there is a serious question of whether service on a Japanese corporation such as Honda which does not admit to agents within the United States, *Fields v. Peyser*, 75 Wis. 2d 644, 250 N.W. 2d 311 (1977), can be obtained short of hiring a Japanese law firm for assistance. If this becomes necessary, the case load of Japanese judges may require proceedings that would last for 8-10 years. Ramseyer, "Japan's Myth of Non-Litigiousness." *National Law Journal*, July 4, 1983.

sistent with the purpose of the Commerce Clause to assure free access to the national marketplace for persons engaged in interstate commerce so as to avoid local exploitation of the American consumer. What greater instance of consumer exploitation can there be than to allow unrepresented foreign corporations, including those such as Honda that may never be served with process, to freely ship defective products into a state and to grant these corporations the same procedural remedy of a limitations defense enacted for the benefit of domestic and foreign corporations with registered agents in that state?

In *Sioux Remedy*, *supra*, this Court held that it is "without doubt (that) a foreign corporation seeking to enforce (a right to collect) in the courts of a state may be required to conform to the prevailing modes of proceeding in those courts." 235 U.S. at 204, 59 L.Ed. at 198. As support for the foregoing proposition of law, Justice Willis Van Devanter in *Sioux Remedy* cited *Blake v. McClung*, 172 U.S. 239, 43 L.Ed. 432 (1898) where this Court held:

> "There are privileges that may be accorded by a state to its own people in which citizens of other states may not participate. . . For instance, a state cannot forbid citizens from suing in its courts, that right being enjoyed by its own people, but it may require a non-resident. . . to give bond for cost although such bond be not required of a resident." 172 U.S. at 256, 43 L.Ed. at 438.

This Court has often reiterated that a limitation defense is not a fundamental or substantive right but a procedural remedy belonging to the *lex fori* of the jurisdiction in which relief is sought which is "good only by legislative grace" and "subject to a relatively large degree of legislative control." *Chase Securities Corp. v. Donald-*

son, 325 U.S. 304, 314, 89 L.Ed. 1628, 1636 (1945); see also *Campbell v. Holt*, 15 U.S. 620, 29 L.Ed. 483 (1885) (adopting as a working hypothesis the concept that statutes of limitation go to matters of remedy as opposed to fundamental substantive rights); *Tioga R.R. Co. v. Blossburg & Corning R.R. Co.*, 20 Wall 137, 22 L.Ed. 331 (1874) (J. Hunt, concurring) (acknowledging that tolling provisions are an integral part of statutes of limitations in various states, including *inter alia*, the State of New Jersey).

Succintly stated long ago by Justice William Johnson in *Hawkins v. Barney's Lessee*, 5 Peters 457, 8 L.Ed. 190 (1831), statutes of limitations "constitute a part of the *lex fori* of every country, they are laws for administering justice—one of the most sacred and important sovereign rights and duties" and are a subject "over which every community is at liberty to make a rule for itself." 5 Peters at 466-467, 8 L.Ed. at 193-194.

Perhaps the fullest exposition of the fact that there is no vested right to a statute of limitations—*nor its tolling provisions*—is found in the opinion of Chief Justice Waite in *Terry v. Anderson*, 95 U.S. 628, 24 L.Ed. 365 (1877):

> "The parties to a contract have no more vested interest in a particular limitation which has been fixed, *than they have in an unrestricted right to sue.* They have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced; and as to the forms of action or modes of remedy, it is well settled that the Legislature may change them at its discretion, provided adequate means of enforcing the right remain." (Emphasis added) 95 U.S. at 633, 24 L.Ed. at 366.

Although not mentioned by the court below, on the authority of this Court's decisions in *Sturges v. Crowninshield, supra,* and *Hawkins v. Barney's Lessee, supra,* an early New Jersey high court had upheld the predecessor tolling statute to *N.J.S.A.* 2A:14-22 as being exempt from constitutional attack on the basis that as an integral part of the New Jersey statute of limitations it was part of that state's court practices controlling matters pertaining to remedial as distinguished from substantive rights.

Speaking for a four man majority of a five man Supreme Court of Judicature in *Smith's Executors v. Tucker,* 17 N.J.L. 82 (Sup. Ct. 1839), Justice William L. Dayton held that the tolling statute did not divest any person of a vested right, nor did it vary a contract, or limit existing liabilities but did directly the reverse—"for here there is no limitation, but a mere extension of the remedy against such as do not reside in or have removed from the State. This matter concerns the practice of our courts, merely; it is part of the *lex fori;* and may be altered or modified at the pleasure of the Legislature. *Sturges v. Crowninshield,* 4 Wheat. 122. *Hawkins, et al. v. Barney's Lessee,* 5 Peters, *R.* 457." 17 N.J.L. at 85-86.

Yet another sound precedent ignored by the court below bearing on the constitutional question raised by this cross-petition when the majority rendered its judgment in *Coons I* is the decision in *Martin v. Atlas Estate Co.,* 72 N.J. Eq. 416, 65 A. 881 (E. & A. 1907) holding that appointment of a registered agent does no more than create an *additional* non-exclusive agent of the corporation upon whom process may be served. The holding in *Martin* was codified by the New Jersey Legislature when it enacted *N.J.S.A.* 14A:4-2(3) which provides that designation of a registered agent "shall not exclude any other method provided by law for service of process upon

a corportion, domestic or foreign . . ." See Commissioner's Comment—1968 to *N.J.S.A.* 14A:4-2.[12]

To sum up, the judgment of the New Jersey Supreme Court in *Coons I* that the unconditional availability to unrepresented foreign corporations of a limitations defense or, alternatively, its denial, be treated as the equivalent of a fundamental substantive right such as the right to sue and therefore constitutes a *per se* violation of the Commerce Clause, is a case of first impression that mandates review by this Court. It is a judgment which conflicts with applicable analogous venerable precedent that a legislature of a sovereign state of our federal union may constitutionally differentiate between residents and nonresidents, individuals and corporations alike, in the allocation of procedural remedies and modes of proceeding in its courts. If, as Honda and its supporting corporate *amici* may suggest in response to this cross-petition, the time has come to overrule this precedent based on an expanded notion of Commerce Clause standards, it is for this Court, *not* the court below, to make that novel determination.

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12. As noted previously, the cross-petitioner has assumed for the purposes of the foregoing analysis that the interpretation of "represented" by the majority in *Coons I*—which requires a foreign corporation to register to do business in New Jersey before it can obtain the "benefit" of the tolling statute—would be binding on New Jersey litigants. This court is not so bound, however, when the construction of a state statute may determine a federal question such as application of Commerce Clause standards. See footnote 9, *supra*. Therefore, the majority construction of the term "represented" in *Coons I* is open to scrutiny by this Court on review.

CONCLUSION

Based on the foregoing reasons, the cross-petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Robert H. Jaffe
ROBERT H. JAFFE
JAFFE & SCHLESINGER, P.A.
8 Mountain Avenue
Springfield, N.J. 07081
(201) 467-2246
Counsel for Cross-Petitioner
Walter P. Coons

Dated: October 10, 1984

CERTIFICATION OF COUNSEL

The undersigned, a member of the bar of this Court, hereby certifies that Honda's petition for a writ of certiorari in this case was received in the office of Jaffe & Schlesinger, P.A., attorneys for cross-petitioner Walter P. Coons, on September 13, 1984. I make this certification in connection with the claim of the cross-petitioner that this untimely cross-petition is being filed within the time limits of *Rule* 19.5 of this Court.

Dated: October 10, 1984

/s/ Robert H. Jaffe
ROBERT H. JAFFE

EXHIBIT "A"

1984 NEW JERSEY SENATE BILL NO. 953, approved August 23, 1984

AN ACT concerning the state of limitations in certain cases and amending *N.J.S.* 2A:14—22.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. *N.J.S.* 2A:14–22 is amended to read as follows:

2A:14–22. If any person against whom there is any of the causes of action specified in sections 2A:14—1 to 2A:14—5 and 2A:14—8, or if any surety against whom there is a cause of action specified in any of the sections of article 2 of this chapter, is not a resident of this State when such cause of action accrues, or removes from this State after the accrual thereof and before the expiration of the times limited in said sections, or if any corporation or corporate surety not organized under the laws of this State, against whom there is such a cause of action, is not represented in this State by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person or surety is not residing within this State or such corporation or corporate surety is not so represented within this State shall not be computed as part of the periods of time within which such an action is required to be commenced by the section. The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation.

A corporation shall be deemed represented for purposes of this section if the corporation has filed with the Secretary of State a notice designating a representative to accept service of process.

2. This act shall take effect immediately.

EXHIBIT "B"

ACCOMPANYING STATEMENT TO
Senate Bill No. 953 dated June 18, 1984

N.J.S. 2A:14–22 tolls the running of the statute of limitations in civil actions against foreign corporations that are not represented in New Jersey and thus cannot be reached with service of process. Senate Bill No. 953 would provide that a foreign corporation would be deemed represented in New Jersey for the purpose of *N.J.S.* 2A:14–22 if the corporation filed with the Secretary of State a notice designating a representative to accept service of process.

Senate Bill No. 953 was introduced in response to a recent New Jersey Supreme Court decision, *Coons v. American Honda Co., Inc.*, 94 N.J. 327 (1983). In the *Coons* case, the plaintiff was injured when he was thrown from a Honda motorcycle. Suit was instituted four years after the accident. At that point the defendant raised the two year statute of limitations as a defense. In that decision, the court determined that in order to be "represented" in the context of *N.J.S.* 2A:14–22, a foreign corporation must obtain a certificate to do business in New Jersey. The court ruled that this requirement was in violation of the commerce clause of the U.S. Constitution in that it unduly burdened interstate commerce by requiring a foreign corporation engaged exclusively in interstate commerce to obtain such a certificate.

The filing of a notice designating a representative to accept process is a less burdensome requirement than obtaining a certificate to do business. Therefore, by providing that a foreign corporation would be deemed represented for purposes of *N.J.S.* 2A:14–22 if such a notice were filed, Senate Bill No. 953 is intended to meet the Supreme Court's objections as stated in the *Coons* decision and thereby assist New Jersey citizens to pursue their claims against foreign corporations.

Although recently a subsequent decision was rendered in the *Coons* case, it was limited to the issue of whether the *Coons I* decision should be applied retroactively. The court ruled that the decision should be applied prospectively only, from the date of the *Coons I* decision, August 3, 1983, thereby letting lawsuits to be filed until August 1985.

EXHIBIT "C"

**LETTER DATED DECEMBER 22, 1977
FROM AMERICAN HONDA MOTOR CO., INC.
TO NATIONAL HIGHWAY TRAFFIC SAFETY
ADMINISTRATION OFFICE OF COMPLIANCE**

**HONDA
AMERICAN HONDA MOTOR CO., INC.
P.O. BOX 50—100 W. ALONDRA BLVD.,
GARDENA, CALIF. 90247
CABLE ADDRESS—AMEHON, GARDENA, CALIF.
(213) 327-8280**

December 22, 1977

Office of Compliance
National Highway Traffic Safety Administration
Washington, DC 20591

Gentlemen:

On December 16, 1977, Honda Motor Co., Ltd., determined that a defect which relates to motor vehicle safety exists in the fuel filler cap release mechanism of certain Honda motorcycles.

The following defect information report is being submitted in accordance with regulations in Part 573.

1. Name of Manufacturer: Honda Motor Co., Ltd.
2. Manufacturer's Agent: Tanaka Walders & Ritger
   1819 H Street, NW
   Washington, DC 20006

2. Identification of Potentially Affected Vehicles:

Model	Description
CB 750	K0, K1, K2, K3, and 1974, 1975 and 1976 Model Years
CB 550	1974, 1975, and 1976 Model Years
CB 500	K0, K1, and K2
CB 500T	1975 and 1976 Model Years
CB 450	K3, K4, K5, K6, and 1974 Model Year
CL 450	K3, K4, K5, and K6
CB 400F	1975 and 1976 Model Years
CB 360	1974 Model Year
CB 360G	1974 Model Year

CB 360T	1975 and 1976 Model Years
CL 360	1974 and 1975 Model Years
CB 350	K3, K4, and K5
CL 350	K3, K4, and K5
SL 350	K0, K1, and K2
CB 350F	F0 and 1974 Model Year
CB 200	1974 Model Year
CB 200T	1975 and 1976 Model Years
CL 200	1974 Model Year

Dates of manufacture of affected vehicles will be supplied as soon as available.

3. Total Number of Vehicles Potentially Affected: Approximately 1,390,000.

4. Estimated Percentage of the Potentially Affected Vehicles that Contains the Defect: 100%.

5. Defect Description: During a collision, it may be possible for the rider to impact the hinged fuel filler cap in such a manner as to actuate the release lever resulting in opening of the cap. If the cap opens, gasoline will escape and cause a fire hazard.

6. Chronology of all Principle Events that were the Basis for the Determination of the Existence of a Safety Defect:

December 15, 1977	Meeting between Honda and NHTSA concerning hinged fuel filler cap investigation.
December 16, 1977	Honda Motor Co., Ltd., determined that a safety relate defect existed.

7. Measures to be Taken to Repair the Defect:

Information will be provided as soon as available.

Very truly yours,
AMERICAN HONDA MOTOR CO., INC.

/s/ C. L. Hale
C. L. HALE
Vice President
Technical Division

CH:lf

EXHIBIT "D"

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION OFFICE OF DEFECTS INVESTIGATION, INVESTIGATING REPORT O.D.I. CASE NO. C3-02 (TABLE OF CONTENTS OMITTED)

I. BACKGROUND

A. *Basis for Investigation*

This case was opened based on reports of two operators of 1971 Honda CB750 motorcycles who sustained burn injuries during a traffic accident. Both reports alleged the gas caps came opened allowing fuel to escape.

Investigation was initiated to determine whether the alleged problem constituted a safety-related defect within the meaning of the National Traffic and Motor Vehicle Safety Act of 1966 (Act of 1966). The NHTSA's objectives were to discover whether the alleged problems occur and, if so, whether such occurrence results in fire, property damage or injury, accidents, or other safety-related problems.

B. *Description and Function*

Subject motorcycles are equipped with gas caps which are hinged on its forward side and secured by a latch on its rear side. Two styles of caps exist—the "single action" and the "double action" styles. The single action cap is opened by depressing a latch lever. The double action cap is opened by simultaneously depressing the latch lever and the cap.

C. *Analysis of the Alleged Problem*

Failure Mode: Reportedly, subject gas tank caps can be unintentionally opened in an accident situation due to rider contact with the tank cap and latch lever.

Failure Symptoms: There are no known pre-failure warning symptoms.

II. FAILURES ALLEGED AND NHTSA ACTIONS

The following reports of unintentional gas cap opening involving subject motorcycles as well as resulting injury or property damage accidents or other safety hazards were acquired during the investigation. NHTSA action, including follow-up investigation, document review and analysis, are also included herein.

A. *Consumer Reports directly to NHTSA (55) (A17) (131)**

1. John Grochala
   8242 Creek Line Drive
   San Antonio, Texas
   Date of Accident: March 17, 1974

Mr. Grochala and his wife, riding a 1973 Honda CB350 with a double action gas cap, impacted the rear of stopped pickup truck at approximately 55 mph. Both riders suffered severe orthopedic injuries.

A fire broke out resulting in reported third degree burns to Mr. Grochala's lower body. In their letter dated January 29, 1976, Honda states their belief that the Grochala cap was "closed during the fire." NHTSA examination of the gas tank shows depressions on its top surface and that the latch hook and lever are missing.

2. Alan R. Lewis (1.8) (A21.1) (131)
   130 Vernon Avenue
   Rockville, Connecticut
   Date of Accident: June 1976

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* Number shown in parenthesis represents the case file identification number wherein further details can be found.

According to Mr. Lewis, he was operating his 1973 Honda Cl-350 with a double action cap when a car turned in front of him. Anticipating the crash, he "braced" himself by placing his right hand on top of the tank and cap. He struck the car broadside at an estimated 15 to 20 mph. Following the impact, the gas cap was observed to open. No fire resulted.

3. David J. O'Connor (5) (A18) (131)
   2659 Northeast 59th Street
   Seattle, Washington
   Date of Accident: September 10, 1971

Mr. O'Connor, riding a 1971 Honda CB750 with a double action cap, struck a piece of wood in an intersection at an estimated 40 mph and crashed. A fire broke out resulting in reported third degree burns on O'Connor's legs and left hand and first and second degree burns on the other parts of his body. Mr. O'Connor believes he slid over the top of the tank and opened the cap. Honda, in the ensuing litigation, expressed their belief that the cap did not open. Three witnesses testified that they observed the cap to be open following the accident.

4. John S. Peters (1.3) (A7) (131)
   5107 W. 133rd Street
   Hawthorne, California
   Date of Accident: November 15, 1974

Mr. Peters and a passenger, on a 1973 Honda CB350 with a double action cap, struck the rear of a stopped automobile at an estimated 15 mph. A fire broke out resulting in reported serious burns to Peter's extremities and abdomen. The passenger suffered burns of his hands, leg, and crotch area. Examination of the gas tank shows depressed areas on its top half.

5. Frederick D. Stueve (1.11) (A19) (93) (131)
   2517 Lincoln Street
   Topeka, Kansas
   Date of Accident: August 31, 1975

Mr. Stueve, operating his 1972 Honda CB450 with a double action cap, was struck by an automobile traveling approximately 20 mph. The automobile's right front corner made deep penetration into the motorcycle's gas tank. A fire broke out resulting in fatal injuries to Mr. Stueve who sustained second and third degree burns over 85% percent of his body. Fuel escaped from six rivet holes in the side of the tank where an ornament was evidently mounted by the owner. The accident dynamics and the lack of damage to the motorcycle's top side suggest that Mr. Stueve did not move forcefully forward onto the tank, thus, it is considered improbable that the cap opened due to rider contact.

6. Francis W. Wheelock (A5.1) (17.1) (131)
   7655 Third Street
   Dexter, Michigan 48130
   Date of Accident: April 9, 1972

Mr. Wheelock and a passenger, on 1970 Honda CB750 with a single action cap, struck an automobile head-on at a closing speed of no less than 45 mph. The accident resulted in "serious" physical injuries to both riders. No fire occurred. Examination of the tank shows its top side to be badly dented and cap opened as per page 14.

7. Richard N. Williams (71) (A22) (131)
   1465 Seminary
   Oakland, California
   Date of Accident: May 18, 1975

Mr. Williams, operating his 1973 Honda CB750 with a double action cap, lost control of his motorcycle and

crashed. It is reported that the motorcycle's front end separated from the rest of the cycle. A fire broke out resulting in reported burn injuries to Mr. William's arms, hands, legs, pelvic and torso area. A few small dents are present on the surface of the gas tank. The cap latching mechanism is missing and could have sheared off, melted, or both.

8. Terry A. Wisler (88) (90) (91) (A21) (131)
   Key Largo, Florida
   Date of Accident: September 19, 1975

Mr. Wisler, operating his 1972 Honda CB750 with a double action cap, struck the side of a Winnebago motorhome at an impact speed of approximately 40 mph. Mr. Wisler died from severe orthopedic injuries sustained from the impact. In addition, a fire broke out causing third degree burns to his legs. The gas tank shows extensive crush damage on top side and the gas cap and portions of the latching mechanism are missing and appeared to have "torn" loose. A puncture hole approximately .25 inches in diameter was also found on the tank.

B. *Consumer Reports through Honda*

1. Augusta C. Prentiss (50) (A20) (131)
   5516 Arizona
   Concorde, California
   Date of Accident: December 8, 1973

Mr. Prentiss, operating his 1970 Honda CB750 with a double action cap, struck a vehicle head-on at an estimated closing speed of 70 mph. A fire broke out resulting in reported first, second, and third degree burns on Prentiss' face, arms, and upper body. Examination of the gas tank shows severe crush damage on its top and sides. The gas cap is missing and the latch hook is also missing.

2. Ted J. Vaughn (50) (A13) (131)
2149 W. 230th Street
Torrance, California
Date of Accident: June 12, 1973

Mr. Vaughn and a passenger, riding a 1970 Honda CB450 with a single action cap, struck the rear end of a slow moving car at an estimated speed of 30 mph. A fire broke out resulting in fatal burn injuries to Mr. Vaughn and minor burn injuries to the passenger. Examination of the motorcycle gas tank shows a small depression on its top side.

C. *International Four Owners Association (IFOA)*

The IFOA is an association of Honda motorcycle owners, particularly owners of four-cylinder Honda motorcylces. The IFOA advised the NHTSA of one accident.

1. Wiliam Mitchell (6) (A16) (131)
Crested Butte, Colorado

Mr. Mitchell, operating his 1971 Honda CB750 with a double action cap, collided with the side of a laundry truck which "sideswiped" him. A fire broke out resulting in third degree burns on Mitchell's face and 60 percent of his body. Examination of the gas tank shows extensive crush damage on its right and top side.

D. *Summary of Failures*

A total of eleven reports of unintentional gas cap opening involving subject motorcycles have been received by the NHTSA. One of these, involving Mr. Stueve, does

not appear to relate to the failure made under investigation. Details of the other ten accidents are tabled below.

Name	Estimated Closing Speed	Type of Tank Damage	Fire	No. of Burn Inj.	Fatal
Grochala	55	top surface depressed, latch broken	yes	2	0
Lewis	20	little or none	no	0	0
O'Connor	40	little or none	yes	1	0
Peters	15	top surface depressed	yes	2	0
Wheelock	45	top surface depressed	no	0	0
Williams	unk	top surface depressed, latch broken	yes	1	0
Wisler	40	top surface depressed, tank punctured, latch broken, cap missing	yes	yes	1
Prentiss	70	top surface depressed, latch broken, cap missing	yes	1	0
Vaughn	25	top surface depressed	yes	1	1
Mitchell	25	top surface depressed	yes	1	0

It is noted that the incidents involving Messrs. Grochola, Wheelock, Wisler, and Prentiss involved high speed accidents with severe orthopedic injuries to riders.

III. TECHNICAL DATA ACQUIRED AND NHTSA ACTIONS

The following information bearing upon the design, construction, materials, and performance aspects of subject motorcycles was acquired during the investigation. NHTSA action, including document review and analysis, are also included herein.

A. *Honda Motor Company*

1. *Design*

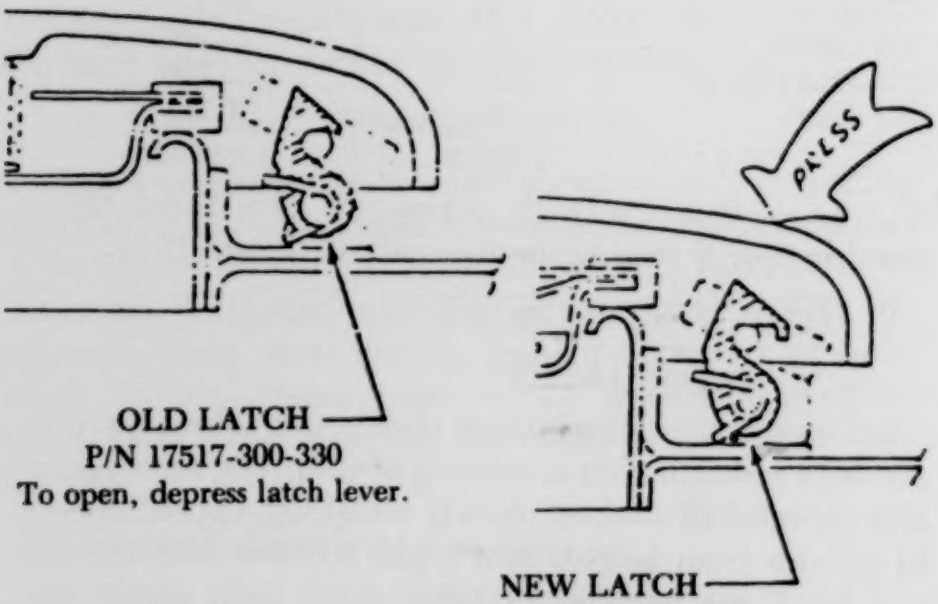
The two styles of subject gas caps are identified by the following part numbers:

Style	Part Number
single action	17517-300-330
double action	17517-300-340

A Honda service bulletin dated January 13, 1971, (130) announced that:

"Current models using the hinged fuel tank caps are equipped with a redesigned latch for additional security."

The sketch included in that service bulletin is shown below:



OLD LATCH
P/N 17517-300-330
To open, depress latch lever.

NEW LATCH
P/N 17517-300-340
To open, press fuel tank cap downward, then depress latch lever.

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2. Construction

By letter dated April 4, 1977, (119) Honda provided production figures for motorcycle models using subject hinged gas caps.

Year and Model	No. motorcycles produced	
	single action	double action
1970-1976 CB750	38,413	243,596
1974-1976 CB550	0	81,286
1971-1973 CB500	0	86,411
1975-1976 CB500T	0	39,691
1970-1974 CB450	19,198	112,863
1970-1973 CL450	14,181	43,782
1975-1977 CB400F	0	36,585
1974 CB360	0	38,694
1975-1976 CB360T	0	93,356
1974-1975 CL360	0	19,533
1971-1973 CB350	0	193,337
1971-1973 CL350	0	126,734
1970-1972 SL350	38,727	58,049
1973-1974 CB350F	0	57,110
1974 CB200	0	13,020
1975-1976 CB200T	0	35,390
1974 Cl200	0	7,500
	110,519	1,286,937

It is noted that the single action gas caps listed above were used only during model years 1970 and 1971.

3. *Static Testing of Gas Cap*

a. *Drop Tests* (A6) (41)

Information received from Honda indicates they conducted a series of tests consisting of dropping rectangular and cannonball shaped objects weighing approximately 44 pounds from heights of 8.2 and 9.8 feet onto the cap and latch mechanisms of tanks with both single and double action caps. Of 13 drops onto tanks with single action caps, caps were observed to open in two instances. Of 11 drops onto tanks with double action caps, one

instance of cap opening occurred ue to damage of the latch hook.

b. *Latch Strength Tests* (A6)

Honda conducted tests to determine the static strength of the cap latching mechanism. Tests consisted of pulling on the latched cap from various angles. Tests were conducted using a fixture-mounted tank having a double action cap with results as shown below:

Direction of Load	Results
45 degree diagonal pull	latch hook broke at 440 lbs.
vertical pull	latch hook broke at 364 lbs.
horizontal pull	tank attaching mounts broke at 275 lbs.

c. *Crush Tests* (A6)

Honda conducted tests wherein gas tanks were run over by a "2-ton" truck. A series of four tests were run and none of the caps opened. It is noted that, in one case, the latch lever broke but the cap remained shut.

d. *Intentional Maneuver Tests* (A6)

Honda conducted tests which consisted of ". . . rolling and sliding portions of the human body, equipment and other objects on the fuel filler cap and the cap check" to determine if the cap could be opened intentionally. Using such body parts and equipment including elbows, knees, hands, boots, helmets, an athletic supporter, rollers, and a cylinder, the cap could be opened in each instance.

4. *Dynamic Testing of Gas Cap*

a. *Sled Tests* (A3)

Honda conducted tests using a sled and rail system wherein tanks, in various positions, were impacted into a

barrier. Using tanks with double action caps, tests were conducted on both production tanks and on tanks with intentionally deformed latching mechanisms. In five tests using production tanks, none of the caps opened. Of 17 tests with deformed latching mechanisms, one cap, whose latch spring was removed, opened on impact. Honda, on the basis of these tests, concludes that subject caps cannot be opened due to collision impact forces alone.

b. *Crash Tests* (A6) (41)

Honda conducted a series of eight crash tests using anthropomorphic dummies mounted on motorcycles with tanks having double action caps. Tests were conducted at various motorcycle speeds ranging from 5 to 30 mph and consisted of crashes into fixed barriers and automobiles. None of the caps opened upon impact. A similar series of three crash tests were conducted by Honda using motorcycles equipped with single action gas tank caps. These crash tests were conducted with wet paint on the cap and latch lever to determine if the dummy and the cap or latch made contact. Results of the test showed the caps did not open and that there was no contact between the dummy and the cap or latch lever.

Honda also furnished other crash test data for which they conclude that:

> ". . . tests do not show the possibility of the fuel filler cap being opened as a result of the rider's body contacting the vicinity of the cap."

5. *Honda Position*

By letter dated November 14, 1972, (12) Honda advised that, in the event of an accident, the necessary forces to open a subject cap ". . . might be created by riders" but that the chance of this happening is "extremely remote."

By letter dated January 29, 1976, (72) Honda states that ". . . subject motorcycles do not contain a defect related to motor vehicle safety." This position is based on Honda's analysis of accidents involving the alleged failure mode and on simulated crash tests for which Honda concludes that ". . . the alleged failure mode does not in fact occur in real-life situations."

B. *NHTSA Testing*

1. *ODI Static Tests* (A4)

Tests were conducted by the Office of Defects Investigation (ODI), NHTSA, to determine if subject gas caps could be opened by sliding and pressing movements of the human body on the gas cap and latch lever. Testing was conducted on a stationary motorcycle and included both single and double action caps. Significant test results showed that the single action and the double action cap could be opened by:

a. sliding the crotch area over the top of the tank.

b. sliding the left leg (shin section) across the rear portion of the cap and latch lever.

c. striking the cap and latch lever with the heel of the hand.

2. *R and D Crash Testing* (54)

Under the contract DOT-HS-126-1-186, the Office for Research and Development (R and D), NHTSA, conducted two crash tests using motorcycles equipped with Honda gas tanks with "flip-top filler caps." Both tests involved 30 mph skids, one with a dummy rider only and the other with a dummy rider and passenger. Significant reported observations were as follows.

a. Test with rider only: When the motorcycle skidded, the dummy rider is reported to have ejected

cleanly." the fuel tank filler cap remained intact with no leaking of simulated fuel.

b. Test with rider and passenger: It is reported that the front dummy ". . . made sliding pelvic contact with the fuel tank." The gas cap remained closed, however, with no loss of fuel.

IV. OTHER NHTSA ACTIONS

The following are results of other NHTSA actions taken during the investigation.

A. *Public Advisory Action*

The NHTSA's November 14, 1973, "Defect Investigatory Cases Report" announced the pendency of this investigation. A similar release, which is repeated at monthly intervals during a pending investigation, is sent to more than 4,000 newspapers, radio and television stations as well as to other media representatives, consumer groups and organizations whose total consumer readership or audience is estimated in the tens of millions. The NHTSA's February 28, 1975, release of the foregoing report announced that this case was placed in the "suspended" category.

On June 17, 1976, the Department of Transportation issued a Consumer Advisory announcing the reactivation of this case. This special advisory requested consumers to write to the Agency if they ". . . experienced gasoline leakage or fires due to dislodgement of their gas tank filler caps. . ."

B. *NHTSA Publications Search*

During this investigation, a search for pertinent published information disclosed the following:

1. *Motorcycle Facts,* National Safety Council (NSC), Chicago, Illinois, November 1974. (A10)

The NSC publication contained the following statistics regarding motorcycle accidents:

- In 1973, there were approximately 4,222,000 motorcycles registered in the United States.
- In 1973, some 360,000 accidents involving motorcycles were reported. This is 8.5 percent of the registered motorcycles.
- In 1973, 2,850 motorcyclists were killed in accidents.
- Nationally, for *all* types of vehicles, 8.1 percent of accidents involved death or injury.
- Regarding injuries, the NSC reports that ". . . the parts of the motorcyclist's bodies most often injured are the head, arm, and leg."
- Studies in two states revealed that the speed range most often recorded in motorcycle accidents was 21 mph to 30 mph.

2. *Analysis of Motorcycle Accident Reports and Statistics,* Motorcycle Safety Foundation (MSF), Linthicum, Maryland. (A10)

Based on accident statistics, the most prevalent motorcycle accident occurs in an urban environment with the motorcycle striking another vehicle. The MSF report states that:

> "Evidence demonstrates that once a motorcycle accident occurs, there is a high probability that serious injury or a fatality will result."

3. *Fire in Motor Vehicle Accidents*, Peter Cooley, Highway Safety Research Institute, University of Michigan, April 1974. (A10)

The report revealed, in part, that:

- fires occur in approximately 0.1 percent of *all* motor vehicle accidents which occur in the United States.

- of the annual fatalities occurring in vehicle accidents, 1 to 1.5 percent ". . . resulted from vehicle fires."

- The Michigan Fatal Accident File showed 3 motorcycle fatal accidents with fires. In each case, the accidents were "side-impact" crashes which "ruptured the motorcycle fuel tanks."

C. *Vehicle Population* (132)

It is estimated that of the 1,397,456 motorcycles originally manufactured with single and double action gas caps, 1,334,595 would be remaining as of June 1977.

D. *Estimate of Accidents Involving Subject Motorcycles* (132)

Based on accident statistics and the estimated vehicle population, it has been calculated that, as of June 1977, some 517,000 accidents have already occurred involving subject motorcycles. It is predicted that some 778,000 accidents will still occur for subject motorcycles during their remaining lifetimes.

E. *Record Checks*

1. *Vehicle Owner Letter File*

The NHTSA's motor vehicle owner letter file, initiated in September 1966, contains all letters and telephone con-

tacts received from all sources reporting defects and other problems with motor vehicles. At present, approximately 1,500 documents enter the file each month.

All pertinent reports found in the file are discussed under Section II.

2. *Accident Investigation Division (AID), Office of Statistics and Analysis NHTSA*

The AID contains records of accident investigations received by the NHTSA from 12 major sources, nationwide. As of September, 1975, the results of approximately 1,518,000 accident investigations are contained in the records checked by the AID.

Information relating to 17 motorcycle accidents which involved fires and/or gasoline leakage was analyzed. Eleven of the 17 did not contain information relevant to this case. The following table summarizes information regarding the remaining six cases.

Case File Index No.	Year and Model	Closing Speed	Reported Problem	Fire (Yes/No)
A5.1 *	1970 Honda 750	45	Cap opened	No
A5.3	1970 Triumph	60	Gas Line Ruptured	Yes
A5.11	1971 Kawaski 500	55-65	Gas Line Ruptured	No
A5.14	1971 Norton	35	Gas Line Ruptured	No
A5.16	1972 Honda 450	60	Fuel Tank Ruptured	No
A5.17	1972 Harley-Davidson	50	Gas Line Ruptured	Yes

* This is the Francis Wheelock accident which was discussed in section II.

The AID also furnished a summary of accident data obtained in their Michigan/Illinois study as follows: (37)

Location	Environment	No. of Accidents	No. Fires Reported
Michigan	urban/rural	4,380	0
Chicago	urban	126	0
Illinois	interstate	1,102	6

The summary states that the Michigan data is "considerably under-involved" in reported fires probably due to non-reporting. The six accidents involving fires in Illinois represent the "higher speed, more severe" accidents. These six accidents involve two Suzukis, two Harley-Davidsons, one Honda, and one BSA motorcycle. No information is available regarding fire causation.

3. *NHTSA Motor Vehicle Safety Defect Recall Campaign Log*

The log contains the make, model, model year and a brief description of the defect for all safety defect recall campaigns reported to the NHTSA by manufacturers in accordance with the Act of 1966. A search of the log disclosed no campaigns related to this investigation.

V. OBSERVATIONS

1. Of the total of 11 reports of unintentional gas cap openings, five involve relatively non-violent accidents in terms of speed, tank damage, and/or orthopedic injuries sustained by the riders. These five incidents involved Messrs. Lewis, Mitchell, O'Connor, Peters, and Vaughn.

2. An estimated 517,000 accidents have already occurred involving subject motorcycles. Some 778,000 more accidents are expected to occur involving subject motorcycles during their remaining lifetime.

Manufacturer Technical Bulletins

The NHTSA's records contain all manufacturer technical bulletins received by the NHTSA from motor vehicle and equipment manufacturers in accordance with the Act of 1966. The bulletins contain instructions for correcting purported non-safety related defects or other service related problems involving the manufacturer's product.

A search of the NHTSA files disclosed one related bulletin previously discussed in section III.

Parts Return Program (PRP)

The PRP, organized in 1971, has been participated in by approximately 500 independent automotive repair shops located throughout the United States who, since the program's inception, have submitted more than 4,500 defective parts to the NHTSA for examination as to whether they represent a safety hazard. The September 1976 PRP newsletter contained an article regarding this investigation. No data pertinent to this investigation has been received in the program.

3. Accident studies reveal that a motorcyclist, once involved in an accident, will probably suffer serious injury or death. Further, if the accident involves relatively high speeds, there is also the chance a fire will occur due to gas tank or gas line rupturing.

4. Sled and crash tests demonstrated that subject gas caps did not open due to collision impact forces alone. Anthropomorphic dummies mounted on crashed motorcycles made no apparent contact with the gas cap.

5. Static tests demonstrate that subject gas caps can be opened by an contact maneuver or impact which depresses the cap and/or latch lever in the correct design sequence. These maneuvers can include sliding and

pressing movements of the human body over the top of the gas cap and latch lever.

VI. CONCLUSION

Investigation established that unintentional gas cap opening can occur due to rider contact with the tank cap and latch lever. Five possible incidents of gas cap opening involving relatively non-violent accidents have occurred resulting in four fires and burn injuries to six riders.

Many thousands of accidents involving subject motorcycles are expected to occur in the future with the accompanying potential for gas cap opening incidents, fires, and burn injuries to riders.